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**International
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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

Victims' Response to "Defence Mention on Defects in the Confirmation of Charges Decision" (Parts I-IV)

Source: Legal Representatives of Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Legal Representatives for Victims (“LRVs”) respectfully request that Trial Chamber IX (“Chamber”) dismiss all four parts of the “Defence Motion on Defects in the Confirmation of Charges Decision” (Parts I-IV) filed on 1 February 2019 (consisting of “Defence Motion Part I”,¹ “Defence Motion Part II”,² “Defence Motion Part III”,³ “Defence Motion Part IV”⁴ respectively).
2. The LRVs hold that the Defence Motion is an attempt to re-litigate matters that have already been settled by the Trial Chamber. Furthermore, pursuant to Rule 134 (2) of the Rules of Procedure and Evidence (“RPE”), the LRVs contend that the Defence is time-barred from raising a challenge to the so-called ‘defects’ in the Confirmation of Charges Decision (“CoCD”).
3. In the event that the Trial Chamber is compelled to consider the substantive arguments raised by the Defence, the LRVs contend that the CoCD provides more than enough detail to Mr Ongwen regarding the nature of the charges against him; and even if the Chamber decrees that specificity in the elucidation of the charges is lacking, any alleged defects have been cured as Mr Ongwen has received timely, clear, and consistent information from the Prosecution detailing the factual basis underpinning the charges. Furthermore, it has been made sufficiently clear throughout the conduct of these proceedings that Mr Ongwen understands the nature of the charges against him.
4. This submission is divided into two parts; the first part responds to procedural matters raised by the Defence Motion; the second part outlines the Victims’ views on the substantive matters raised by the Defence Motion.

¹ Defence Motion Part I, ICC-02/04-01/15-1430 01-02-2019 1/15 EK T.

² Defence Motion Part II, ICC-02/04-01/15-1431 01-02-2019 1/17 EK T.

³ Defence Motion Part III, ICC-02/04-01/15-1432 01-02-2019 1/15 EK T.

⁴ Defence Motion Part IV, ICC-02/04-01/15-1433 01-02-2019 1/17 EK T.

II. PROCEDURAL MATTERS

A. Defence Motion is an attempt to re-litigate matters that have been settled

5. The Defence Motion attempts to re-litigate matters that have already been decided upon by the Trial Chamber. For instance, the Defence assert that Mr Ongwen's fair trial rights have been violated as a result of the distinction made by the Chamber between the charges confirmed by the Pre-Trial Chamber and the Chamber's reasoning in support of its findings in the CoCD.⁵
6. In order to support this claim the Defence make reference to the Defence request to file a no-case-to-answer motion ("No-case to answer motion") and the Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision, both submissions having been dealt with conclusively by the Trial Chamber and Pre-Trial Chamber respectively.⁶
7. Indeed, the four-part Defence Motion merely repeats and sets out in detail paragraph 23 of the Defence No-case-to-answer motion.⁷ For example, in that motion the Defence assert that the Pre-Trial Chamber has a "duty to set out, clearly and precisely, definitions of each of the crimes charged against the accused ...". The Defence also states that it has identified a number of charges that are not supported by sufficient evidence or no evidence, highlighting that they are defective.⁸
8. The Chamber, in its Decision on Defence Request for Leave to File a No Case to Answer Motion, emphasised the distinction between being informed of the charges and the confirmation decision's reasoning, highlighting that the

⁵ Defence Motion, Part I, paras 14-15

⁶ "Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal", ICC-02/04-01/15-1300, 05 July 2018. ICC-02/04-01/15-423, Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision, 29 March 2016 ("Request for leave to appeal CoCD").

⁷ *Ibid*, Defence, no-case-to-answer motion, paras 23-25.

⁸ Defence, no-case-to-answer motion, para. 27.

‘Defence arguments for evidentiary references and legal references fail to appreciate this distinction.’⁹

9. It appears from the latest Defence submission that this difference has yet to be appreciated by the Defence. Thus, the LRVs contend the current Defence motion is repetitive and an attempt to re-litigate issues which have been comprehensively dealt with by the Trial Chamber, resulting in a waste of Court resources and time.

B. Defence Motion is time barred

10. The LRVs note that the Defence Motion has been filed approximately three years after the decision on the confirmation of charges¹⁰ against Dominic Ongwen, and more than two years after the commencement of trial. The Defence has had ample opportunity to bring the alleged deficiencies in the charges to the attention of the Chamber.
11. Indeed, it is unfathomable to the LRVs why the Defence has waited a significant period of time into these proceedings before raising such allegedly egregious violations of Mr Ongwen’s fair trial rights in such detail. As highlighted by the Trial Chamber:

The Defence has argued before that the accused lacks notice of the charges. [...] the Chamber has previously rejected such arguments both for being untimely and on their merits.¹¹

12. Rule 134 of the Rules of Evidence and Procedure (‘RPE’) provides for motions relating to trial proceedings. Specifically, Rule 134(3) of the RPE provides that:

⁹ Decision on Defence Request for Leave to File a No Case to Answer Motion, ICC-02/04-01/15-1309, 18 July 2018, para. 9.

¹⁰ ICC-02/04-01/15-422-Red (“Decision Confirming Charges”), issued on 23 March 2016.

¹¹ ICC-02/04-01/15-1309, para. 9.

After the commencement of the trial, the Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may rule on issues that arise during the course of the trial.

13. The Chamber has previously ruled that:

...Rule 134(2) of the Rules requires the Chamber to give the parties an opportunity at the commencement of trial to raise any objections or observations concerning the conduct of proceedings which have arisen since the confirmation hearings. This rule mandates that '[s]uch objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings without leave of the Chamber in this proceeding'.¹²

14. The Defence Motion does not seek the leave of the Chamber to reiterate its arguments relating to so-called defects in the CoCD, and for this reason alone it should be rejected.

15. The LRVs submit that any discussion in terms of form of the charges (clarity, specificity, exhaustiveness, etc.) and in terms of their scope, content and parameters ends with the confirmation decision, and no issues in this respect can be entertained by the Trial Chamber.¹³

16. Furthermore, any procedural challenge to the formulation of the charges ought to have been brought before the Pre-Trial Chamber, at the latest, as objections under rule 122(3) of the Rules.

17. To the extent that the Defence assert that they are 'raising new points in respect to lack of notice'¹⁴, the LRVs hold that procedural challenges to the formulation of the charges should have been brought to the attention of the Trial Chamber under rule 122(3) prior to the commencement of the trial proceedings.

¹² Para. 13, 'Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision', ICC-02/04-01/15-1147.

¹³ ICC Chambers Practice Manual, February 2016, p.16-17.

¹⁴ Defence Motion, para. 38.

C. Appeal under Article 82(1) (d) of the Statute

18. The Defence's request to file a no-case-to-answer motion was not the only available manner to apprise the Trial Chamber of the alleged violations of Mr Ongwen's 'fair trial right to notice.'¹⁵
19. The LRVs note that the Defence have also sought to appeal the CoCD under article 82(1)(d) of the Statute,¹⁶ which acts as a avenue whereby the Defence can raise issues that would affect the fair and expeditious conduct of the proceedings or the outcome of the trial.
20. In its Request for leave to appeal the Confirmation of Charges Decision the Defence ("Request for leave to appeal CoCD"), claimed that the Pre-Trial Chamber erred in the CoCD by failing to issue a well-reasoned decision.¹⁷ Specifically, the Defence argued, as it does in the Defence Motion, that the Chamber's reasoning in the CoCD was deficient.¹⁸
21. Pre-Trial Chamber II, by majority, rejected the Defence Request for leave to appeal the CoCD, noting that it is only the charges as reproduced in the operative part of the CoCD, and not the reasoning, which are binding in the proceedings, as they delineate the facts and circumstances and set out the parameters of the charges for which the Accused is committed to trial.¹⁹
22. The LRVs reiterate that at this late juncture of the proceedings, the Defence Motion aims at re-litigating arguments that have already been raised and dismissed by both the Pre-Trial Chamber and the Trial Chamber.

¹⁵ Defence motion, ICC-02/04-01/15-1432, paras 4 and 5.

¹⁶ ICC-02/04-01/15-423, Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision, 29 March 2016 ("Request for leave to appeal CoCD").

¹⁷ Request for leave to appeal CoCD, ICC-02/04-01/15-423, paras 25-35.

¹⁸ *Ibid*, para. 32.

¹⁹ Decision on the Defence request for leave to appeal the decision on the confirmation of charges, ICC-02/04-01/15-428, paras 26-27.

III. SUBSTANTIVE MATTERS

A. Defects in the modes of liability

23. The Defence submits that the defects in pleading of the modes of individual criminal liability of Mr. Ongwen under Article 25(3)(a) and (b) of the Statute (direct perpetration, indirect co-perpetration, and ordering) fail to identify the *mens rea* element, violating Mr Ongwen's right to notice under Article 67(1) of the Statute and should therefore be dismissed.²⁰

B. Indirect co-perpetration under Article 25(3)(a)

24. The Defence asserts that the mode of liability of indirect co-perpetration is a) jurisdictionally defective²¹ and b) *ultra vires*, since it is not a theory contained within the statutory language of Article 25(3)(a).²² Again, the LRVs contend that these issues have been litigated by the Defence during the course of confirmation proceedings.²³

25. The Defence states that the pleading of indirect co-perpetration is defective as it omits the objective element of "power to frustrate the commission of the crime" and the subjective element of "awareness of the power to frustrate the crime".²⁴ Specifically, with regard to the latter, the Defence alleges that the *mens rea* element of awareness of the power to frustrate the crime was omitted in the Confirmation of Charges Decision.²⁵ Moreover, the Defence alleges that neither the Prosecution Pre-Confirmation Brief ("PPCB") nor the Prosecution Pre-Trial Brief ("PPTB") cure the defects in pleading of *mens rea* in the CoCD.²⁶

²⁰ Defence Motion Part II, paras 3-4, 8.

²¹ Defence Motion Part II, paras 23-27.

²² Defence Motion Part II, paras 28-31.

²³ Confirmation of Charges Decision, ICC-02/04-01/15-423, para. 37.

²⁴ Defence Motion Part II, paras 32-42.

²⁵ Defence Motion Part II, paras 37-42.

²⁶ Defence Motion Part II, paras 45-78.

26. The standard applied by the ICTY *Blaškić* Appeal Judgement has served as guidance for the ICC Appeals Judgment in *Lubanga* with regards to sufficient notice of the charges for the accused charged with indirect co-perpetration. The *Blaškić* Appeals Chamber held that:

...where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, then the Prosecution is required to identify the “particular acts” or “the particular course of conduct” on the part of the accused which forms the basis for the charges in question.²⁷

27. Following this, the Appeals Chamber in *Lubanga* held that:

...where an accused is not alleged to have directly carried out the incriminated conduct and is charged with crimes committed on the basis of a common plan, he must be provided with detailed information regarding: (i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused’s contribution; (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators.²⁸

28. Furthermore, the Appeals Chamber noted that the underlying criminal acts form an integral part of the charges against the accused, and sufficiently detailed information must be provided in order for the accused person to effectively defend him or herself against them.²⁹

29. Although, the CoCD does not explicitly and separately analyse in detail the mental elements applicable to indirect co-perpetration, it is clear from the references made by the Chamber, as well as from the auxiliary documents (specifically the PPCB and the PPTB), that the Accused is charged as an indirect co-perpetrator based on the standard applied in the *Lubanga* and subsequently

²⁷ *Blaškić* Appeal Judgement, para. 213; ICC-01/04-01/06-3121-Red, *Lubanga* Appeals Judgement, paras 122-123.

²⁸ ICC-01/04-01/06-3121-Red, *Lubanga* Appeals Judgement, para. 123.

²⁹ ICC-01/04-01/06-3121-Red, *Lubanga* Appeals Judgement, para. 123.

in the *Blé Goudé* or the *Katanga* cases, concerning the mental elements that need to be established for mode of liability of indirect co-perpetration.³⁰

30. As noted by the Defence, with regards to the indirect co-perpetration, the CoCD relies on the *Lubanga* Appeals Judgment, which states that this mode of liability “requires an evaluation of whether the person had control over the crime by virtue of his or his *essential contribution within the framework of the agreement with the co-perpetrators and the resulting power to frustrate the commission of the crime*”.³¹ This jurisprudence includes the accused’s awareness of his essential role in the implementation of the common plan, and of his ability to frustrate the common plan.

31. The LRVs submit that the Accused was sufficiently notified of both, subjective and objective elements of indirect co-perpetration. The content of the CoCD as well as auxiliary documents, including the PPCB and PPTB, in their totality provide the Accused with sufficient information in order to prepare his defence. This includes the information about Mr. Ongwen’s alleged conduct that gave rise to criminal responsibility as an indirect co-perpetrator, including the contours of the common plan and its implementation, as well as Mr Ongwen’s contribution.

32. Moreover, based on the CoCD and the auxiliary documents, one can directly infer not only the objective elements pointing to Mr. Ongwen’s alleged “power to frustrate the commission of the crime” but also his awareness of such power.

33. Similar arguments can be made in respect to the Defence’s reasoning regarding an absence of *mens rea* for the mode of liability of indirect co-perpetration under article 25 (3)(b) of the Statute.³²

³⁰ Confirmation of Charges Decision, para.39; ICC-01/04-01/06-3121-Red, *Lubanga* Appeals Judgment, para. 473; ICC-02/11-02/11-186, Decision on Confirmation of charges against Charles Blé Goudé, ICC-02/11-02/11-186, para. 141; Prosecution Pre-Trial Brief, ICC-02/04-01/15-533, para. 140.

³¹ Defence Motion Part II, paras 37-41; ICC-01/04-01/06-3121-Red, para. 473, emphasis added.

³² Defence Motion Part II, para. 11.

34. To conclude, the facts and circumstances of the charges as confirmed by the Chamber are clearly stipulated in the operative part of the CoCD. It is the charges themselves and not the reasoning or references in the confirmation decision, which provides “structure and boundaries” at trial (subject to Regulation 55). As the LRVs have previously argued ‘adding even more detail to the Chamber’s evidentiary references in the Confirmation Decision will not affect the clarity of the case’s scope at trial.’³³

C. Defects in notice of pleading of command responsibility under Article 28(a) and defects in pleading of common purpose liability under Article 25 (3)(d)(i) or (ii) of the Statute

35. The Defence Motion argues that there are three defects in notice in pleading of the mode of liability under Article 28 (a) of the Statute: ‘a) the legal elements identified are incomplete; b) where cited, they simply track the language of the Statute; and c) there are no factual allegations in support of the legal elements of the mode of liability.’³⁴

36. With regards to the pleading of common purpose liability under Article 25(3) (d)(i) or (ii), the Defence argues that the level as to the level of contribution for common purpose liability required is vague in the CoCD, and further convoluted by the Prosecution’s change in theory.³⁵

37. Jurisprudence from the *ad-hoc* tribunals may prove illustrative in this respect in terms of providing clarity as to whether the alleged pleading defects violated Mr Ongwen’s right to sufficient notice of the charges.

38. In *Kamuhanda*, before the International Criminal Tribunal for Rwanda (ICTR) the Appeals Chamber held that an indictment is defective if it does not state the

³³ ICC-02/04-01/15-424, para. 31.

³⁴ ICC-02/04-01/15-1431.

³⁵ Defence Motion, ICC-02/04-01/15-1432, paras. 31-40.

material facts underpinning the charges with enough detail to enable an accused to prepare his or her defence.³⁶ The LRVs hold that the CoCD and particularly the operative part of the Decision is perfectly clear in its elucidation of charges against Mr Ongwen.

39. For the sake of argument, even if the CoCD was defective in relation to Article 28(a) and Article 25(3) (d)(i) or (ii), or indeed in any other other ways suggested by the Defence in the Defence Motion, the LRVs contend that the remedy requested by the Defence – that is a dismissal of all allegations of the modes of liability of command responsibility and common purpose liability – would be overly drastic.

40. In the Appeals Chamber judgments in *Kvočka* and *Kupreškić* before the International Criminal Tribunal for the former Yugoslavia (ICTY), it was held that if the indictment is found defective because it fails to plead material facts or does not plead them with sufficient specificity, a Trial Chamber must consider whether the accused was nonetheless accorded a fair trial.³⁷

41. Jurisprudence before the ICTY highlights that no conviction against the accused can be entered on the basis of material facts omitted from the indictment or pleaded with insufficient specificity, unless the Prosecution has cured the defect in the indictment by provision to the accused of “timely, clear and consistent information detailing the factual basis underpinning the charges against him or her”³⁸

³⁶ See *Kamuhanda* Appeal Judgement, ICTR-99-54A-A, para. 17, and *Kupreškić* Appeal Judgement, IT-95-16, para. 88.

³⁷ *Kvočka* Appeal Judgment, IT-98-30/1, para. 33; *Kupreškić* Appeal Judgment, paras 115-123.

³⁸ *Kupreškić* Appeal Judgement, IT-95-16, para. 114; *Kvočka* Appeal Judgement, para. 33; *Naletilic* Appeal Judgement, IT-98-34, para. 26; *Prosecutor v. Bagosora et al.*, Case No ICTR-98-41-AR73, Decision on Aloys Ntabakuze’s Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006 (“*Bagosora* Decision”), para. 17.

42. Furthermore, in *Kordić*, the Appeals Chamber held that in assessing whether a defective indictment was cured, the issue is whether the accused was in a reasonable position to understand the charges against him or her.³⁹

43. In case of a lack of notice, the Defence must raise a specific objection at the time the evidence is introduced.⁴⁰ As the Appeals Chamber stated in the *Niyitegeka* case:

In general, “a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the event of an adverse finding against that party.” Failure to object in the Trial Chamber will usually result in the Appeals Chamber disregarding the argument on grounds of waiver. In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the Indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation. [...]”⁴¹

44. Additionally, in *Muhimana*, the Appeals Chamber held that where an accused has received timely, clear, and consistent information from the Prosecution detailing the factual basis underpinning the charge, the defects in the indictment are considered to be cured and a conviction may be entered.⁴²

45. In the ICTY case of *Naletilić and Martinović*, the Appeals Chamber considered that in some cases, a list of witnesses in a chart, containing a summary of the facts and clearly identifying the charges in the indictment as to which each witness will testify, is sufficient to put the accused on notice.

46. Therefore, even if the Defence alleges defects in the pleading of command responsibility and common purpose liability, any such defect would be cured as

³⁹ *Kordić* Appeal Judgment, IT-95-14/2, para. 142; *Rutaganda* Appeal Judgment, ICTR-96-3, para. 303.

⁴⁰ *Kamuhanda* Appeal Judgment, para. 21, referring to *Niyitegeka* Appeal Judgment, ICTR-96-14, para. 199.

⁴¹ *Niyitegeka* Appeal Judgment, para. 199

⁴² *Muhimana* Appeal Judgment, ICTR-95-1B, para. 217 quoting *Gacumbtsi* Appeal Judgment, ICTR-2001-64-T, para. 49; *Ntakirutimana* Appeal Judgment, ICTR-96-10-A&ICTR-96-17-A, para. 27, referring to *Kupreskic* et al. Appeal Judgment, para. 114; See also *Ntagerura* et al. Appeal Judgment, ICTR-99-46-T, paras 28, 65.

it has been made sufficiently clear throughout the conduct of these proceedings that Mr Ongwen understands the nature of the charges against him.⁴³

47. Furthermore, as was asserted in *Niyitegeka* –timing is of the essence. The Defence must interject when un-pleaded evidence is introduced in the case. As highlighted earlier in this submission, the Prosecution has completed its presentation of evidence, objections relating to lack of notice should have been raised after the issuance of the CoCD.

48. Lastly, the LRVs hold that even if the alleged defects in the operative part of the Confirmation of Charges decision existed, the defence has had consistent and clear information underpinning the factual basis of charges from the Prosecution, including summaries of facts, witness summaries and relevant disclosures, enough to put Mr Ongwen on notice.

D. Defects in CoC Decision in respect the SGBC violate the Court's jurisdiction and Mr Ongwen's right to be informed "in detail of the nature, cause and content of the charges"

49. The Defence for Mr Ongwen argues that the confirmation of the crime of forced marriage by the Pre-trial Chamber was jurisdictionally defective as this crime is subsumed within the crime of sexual slavery.

50. At the outset, the LRVs would like to highlight that the Defence has previously litigated whether forced marriage is a separate crime⁴⁴ as stated in the Defence Motion.⁴⁵ Indeed, the Defence also raised this as a "Fifth Issue" in the 'Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision.'⁴⁶

⁴³ On 6 December 2016, the Trial Chamber held that Mr Ongwen did understand the nature of the charges against him and permitted the trial to proceed. Lines 2-4, ICC-02/04-01/15-T-26-ENG, 6 December 2016.

⁴⁴ ICC-02/04-01/15-t-23-CONF-ENG ET, pages 14-22.

⁴⁵ ICC-02/04-01/15-1430, para. 54 and ICC-02/04-01/15-1430, para. 57.

⁴⁶ ICC-02/04-01/15-423.

51. The Pre-Trial Chamber, in the CoCD held that the central element of forced marriage is the imposition of “marriage” on the victim and agreed with the Prosecutor that victims of forced marriage suffer separate and additional harm to those of the crime of sexual slavery. Forced marriage violates the basic human right to consensually marry and establish a family.⁴⁷
52. Bypassing the repetitive nature of the Defence arguments on this matter, the LRVs, *arguendo*, contend that even though the crime of forced marriage is not a separate crime under Article 7 of the Rome Statute, substantial evidence has been provided in the CoCD demonstrating that throughout the conflict in Northern Uganda, women and girls were systematically abducted by members of the Lord’s Resistance Army (LRA) and compelled to serve as conjugal partners to the LRA soldiers. They were often abducted from their homes, on the way to school, or from camps in circumstances of extreme violence, forced to perform a number of conjugal duties including sexual intercourse, forced labour such as cooking and cleaning, enduring forced pregnancies and bringing up their children in circumstances where they were compelled to move along with the LRA from place to place.
53. In the landmark Appeals Chamber Judgment in the case of *Prosecutor v. Brima, Kamara and Kanu*, before the Special Court for Sierra Leone (SCSL), the Appeals Chamber recognized ‘forced marriage’ as a separate and distinct crime,⁴⁸ reversing the ruling of the Trial Chamber that ‘forced marriage’ was subsumed within the charge of sexual slavery. The Appeals Chamber highlighted that in addition to harm related to the ‘sexual slavery’ element of the crime, ‘bush wives’ and their children born out of the forced marriage ‘suffered long-term social stigmatisation’ by their association with the perpetrators and faced difficulties in reintegrating their community after the war.⁴⁹

⁴⁷ ICC-02/04-01/15-422-Red, paras.87-95.

⁴⁸ *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL2004-16-A, Judgment, ¶ 202 (Feb. 22, 2008).

⁴⁹ *Ibid*, para 199.

54. In *Prosecutor v. Sesay, Kallon and Gbao*, the SCSL convicted three senior members of the Revolutionary United Front (RUF) for the crime of forced marriage, despite the fact, as highlighted above; there was no provision of the separate crime of forced marriage within the SCSL Statute.⁵⁰
55. In the context of the Khmer Rouge, forced marriage in Cambodia pursued the primary aims of severing pre-existing family ties, in order to guarantee complete loyalty to the regime, and controlling the procreation of individuals, rather than subjecting the victims to sexual slavery.
56. In the closing order of case 002, the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia ('ECCC') qualified forced marriage as the crime against humanity of an 'other inhumane act', following the definition set out by the SCSL Appeals Chamber.⁵¹ The Chamber determined that acts of forced marriage practiced under the Khmer Rouge satisfied the elements of this definition since they were part of a widespread attack against the civilian population and entailed the forced imposition of a marital status on the victims, which resulted in severe physical or mental suffering of a degree of gravity comparable to the other listed crimes against humanity.⁵²
57. Indeed, the Pre-Trial Chamber in this case concurred with the SCSL Appeals Chamber in finding that 'the central element of forced marriage is the imposition of "marriage" on the victim, as well as of a social status of the perpetrator's "wife"'.⁵³ It also underlined the exclusivity of this conjugal relationship as 'the characteristic aspect of forced marriage', an element distinguishing the crime from sexual slavery and other crimes against humanity.⁵⁴ With regard to the ensuing harm, the Pre-Trial Chamber held that the social stigma resulting from the imposition of marriage entails 'that the

⁵⁰ *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, (Mar. 2, 2009.)

⁵¹ Extraordinary Chambers in the Courts of Cambodia, Case 002 Closing Order, 15 September 2010, paras 1442-1445.

⁵² *Ibid.*

⁵³ ICC-02/04-01/15-423, para 93.

⁵⁴ *Ibid.*, para 93.

victims of forced marriage suffer separate and additional harm to those of the crime of sexual slavery, or other crimes under the Statute.’⁵⁵

58. The Pre-Trial Chamber went even further, agreeing with the Prosecution, and determined that the interest protected by the characterisation of forced marriage as an ‘other inhumane act’ is ‘the basic right to consensually marry and establish a family’, as enshrined in international human rights instruments, which differ from the values underlying the crime of sexual slavery.⁵⁶

59. The above precedent illustrates that the Defence’s request would result in a regression in international law norms as they relate to the crime of forced marriage and would not accurately reflect the harm suffered by hundreds of women and girls who were distributed as wives to senior commanders of the LRA.

60. The Pre-Trial Chamber confirmed that forced marriage ‘constitutes the crimes of an other inhumane act within the meaning of article 7(a)(k) of the Statute.’⁵⁷ The CoCD, as illustrated above, is perfectly clear in its formulation of the charge of forced marriage and any defence arguments to the contrary must be wholly rejected by the Trial Chamber.

61. As stated by the Pre-Trial Chamber, Mr Ongwen is charged with the crime of “other inhumane acts” under article 7(1)(k) of the Statute, and ‘which can be committed through different conducts insofar as they are of a similar character to those explicitly enumerated by article 7(1) of the Statute and intentionally cause grave suffering or serious physical or mental injury.’⁵⁸

62. Lastly, Judge de Brichambaut, in his dissent to the CoCD highlighted that the charge of forced marriage had been ‘substantially fleshed out by the definition

⁵⁵ *Ibid*, para 94.

⁵⁶ *Ibid*, para 94.

⁵⁷ ICC-02/04-01/15-423, para 95.

⁵⁸ ICC-02/04-01/15-428, para.36.

of the crime and the testimony gathered in the context of the procedure provided for by article 56 of the Statute.⁵⁹

E. Defence arguments relating to a lack of mens rea in respect of certain charges

63. In the *Karadžić* case before the ICTY, the accused challenged his indictment, arguing that it lacked specificity, making it impossible for him to prepare a defence.⁶⁰ The accused argued that the indictment only alleged *mens rea* with respect to the joint criminal enterprise and not for any other forms of liability and neither did it 'provide any material facts that purport to demonstrate that *mens rea*.'⁶¹

64. Similarly, the Defence for Mr Ongwen argues that for the charge of common purpose liability under Article 25(3)(d)(i) and (ii) of the Statute for the crime of conscription of children, there are no elements of *mens rea* identified.⁶² Additionally, the Defence argue that there the CoCD fails to identify the *mens rea* elements for the modes of liability under Articles 25 (3)(a), 25 (3)(b), and 28(a) of the Statute.⁶³

65. With respect to the crime of persecution, the Defence argues that 'there are no specific elements of *mens rea* for persecution for Mr Ongwen and [*sic*] lacks any factual support.'⁶⁴ Lastly, the Defence argue that the CoCD does not identify the elements of enslavement and is silent on the *mens rea* and contextual elements required for a crime against humanity.⁶⁵

⁵⁹ *Prosecutor v. Dominic Ongwen*, Judge Marc Perrin de Brichambaut, *Partially dissenting opinion of Judge Marc Perrin de Brichambaut*, ICC-02/04-01/15-428-Anx-tENG, 14 September 2016, para 14.

⁶⁰ Motion to Dismiss Paragraph 60(k), Case No. IT-95-5/18-T, para. 6.

⁶¹ Motion, paras. 3–4.

⁶² Para 46, ICC-02/04-01/15-1432.

⁶³ Para. 8, ICC-02/04-01/15-1431.

⁶⁴ Para. 11, ICC-02/04-01/15-1433.

⁶⁵ Para. 57, ICC-02/04-01/15-1433.

66. The ICTR Appeals Chamber held that defence objections to an indictment based on lack of notice should be timely in that they should be raised either at the pre-trial stage (in a motion challenging the indictment) or at the time the evidence of a new material fact is introduced.⁶⁶
67. The Trial Chamber in *Karadžić*, when discussing objections based on lack of notice raised at trial, stated that the 'the Trial Chamber should take into account factors such as whether the defence has provided a reasonable explanation for its failure to raise its objection at the time the evidence was introduced and whether the defence has shown that the objection was raised as soon as possible thereafter.'⁶⁷
68. The LRVs submit that since the accused has waited at this late stage in the proceedings to outline in detail alleged defects in the CoCD, the accused now bears the burden of demonstrating that those alleged defects have caused him prejudice.
69. Indeed, the ICTY Appeals Chamber has held that if challenges alleging defects to the indictment and lack of notice are not timely, the burden will shift to an accused, who will have to show that his ability to defend himself has been materially impaired due to those alleged defects.⁶⁸
70. Save for stating that Mr Ongwen has suffered prejudice in the Defence Motion, the Defence fails to sufficiently demonstrate how, in concrete terms, the accused suffered prejudice. For instance, the Defence makes wide assertions that they are unable to mount a proper defence against joint modes of liability.⁶⁹
71. At the same time, during the course of the trial proceedings the Defence has managed to examine all 69 witnesses presented by the Prosecution, as well as those presented both victims' teams and has called 16 witnesses of its own, all

⁶⁶ *Bagosora* Decision, para. 46.

⁶⁷ *Bagosora* Decision, para. 45.

⁶⁸ *Bagosora* Decision, para.18.

⁶⁹ Para. 51-58, ICC-02/04-01/15-1430

without informing the Trial Chamber that its ability to mount a proper defence has been seriously impaired as a result of alleged defects in the CoCD, including those relating to *mens rea* outlined in the preceding paragraphs.

72. Accordingly, based on all the reasons above, the LRVs submit that the Defence Motion is untimely and that the Mr Ongwen has failed to provide a reasonable explanation for his failure to raise these challenges either in pre-trial or at the time the evidence was introduced, or as soon as possible thereafter.

IV. RELIEF SOUGHT

73. The LRVs respectfully request the Chamber dismiss the Defence Motion in its entirety.

Respectfully submitted,



Joseph A. Manoba



Francisco Cox

Dated this 25th day of February 2019

At The Hague, the Netherlands and at Santiago, Chile